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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-225

BRASEA, INC.,
Petitioner

v.

BENDER WELDING & MACHINE COMPANY, INC., CONSTRUCTION MACHINERY COMPANY, and ROY C. WILLIAMS,
Respondents

BRIEF OF RESPONDENT, CONSTRUCTION MACHINERY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Table of Authorities	i
Statement of the Case	1
Reasons for Refusing to Grant the Writ	2
I. PETITIONER IS NOT ENTITLED TO INDEMNITY FROM CONSTRUCTION MACHINERY COMPANY	3
II. DETERMINATION OF THE QUESTION OF INCORPORATION OF STRICT PRODUCT LIABILITY INTO FEDERAL MARITIME LAW WAS UNNECESSARY, AND THE COURT OF APPEALS' DEFERRAL OF DETERMINATION OF THE QUESTION PRESENTS NO CONFLICT WITH ANY OTHER COURT OF APPEALS	5
III. THE COURT OF APPEALS DID NOT APPLY ANY IMPROPER STANDARD OF REVIEW IN REVERSING THE DISTRICT COURT'S FINDINGS ON LIABILITY AND CAUSATION AS TO CONSTRUCTION MACHINERY COMPANY	7
Conclusion	9
Certificate of Service	11

TABLE OF AUTHORITIES

CASES	Page
Italia Societa v. Oregon Stevedoring Company, 376 U.S. 315 (1964)	3, 4
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)	9
Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972)	6
McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965)	6, 7
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	9
Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956)	3, 4
Schaeffer v. Michigan-Ohio Navigation Company, 416 F.2d 217 (6th Cir. 1969)	6
FEDERAL RULES OF CIVIL PROCEDURE	
Rule 52(a), Fed. R. Civ. P.	7
RESTATEMENTS	
RESTATEMENT (SECOND) OF TORTS, Sec. 402A (1965)	6, 7

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Respondent, Construction Machinery Company, prays that the Petition of Brasea, Inc., for Writ of Certiorari be refused. In support of that prayer, Respondent would respectfully show the following:

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case appearing in the opinion of the Court below, United States

Court of Appeals for the Fifth Circuit, reported at 497 F.2d 67 (See Appendix, Brasea's Petition for Writ, pp. 36 et seq.). Otherwise Petitioner's Statement of the Case is sufficiently accurate.

REASONS FOR REFUSING TO GRANT THE WRIT

Respondent submits that review on writ of certiorari should not be granted. None of the issues properly before this Court in this case warrant the granting of a writ. The reasons for refusing to grant the writ are many, and may be summarized as follows:

1. The decision of the Court of Appeals below is not in conflict with any decision of any other court of appeals.

2. The decision is not in conflict with any decision of this Supreme Court.

3. No important question of federal law is raised by the case which needs to be settled by this Court now.

4. The Court of Appeals has not decided any federal question in a way in conflict with applicable decisions of this Court.

5. No necessity has been shown to call for an exercise of this Court's power of supervision.

6. At best, the Petitioner has raised abstract questions of law the resolution of which will not alter the holdings of the Court of Appeals.

7. At best, Petitioner raises issues the resolution of which are of importance to the parties, but not significant to the public.

As to this Respondent, Construction Machinery Company, the Petitioner asserts several propositions none of which are meritorious. To be discussed first will be Petitioner's claim of indemnity. Next to be discussed will be Petitioner's allegation relating to incorporation of the tort theory of strict product liability into federal maritime law. Then to be discussed are the allegations concerning the holding by the Court of Appeals that Respondent is not liable under the theory of strict product liability.

I

PETITIONER IS NOT ENTITLED TO INDEMNITY FROM CONSTRUCTION MACHINERY COMPANY.

Petitioner Brasea makes the conditional argument that, should the liability of this Respondent be restored by this Court, then Petitioner should be entitled to indemnity from this Respondent, citing as authority the opinions of this Court in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) and *Italia Societa v. Oregon Stevedoring Company*, 376 U.S. 315 (1964).

Needless to say, Petitioner's indemnity argument is not material unless this Court should reverse the holding of the Court of Appeals that this Respondent is not liable under the theory of strict product liability. For the many reasons discussed in this Respondent's Brief in Opposition to the Petition of Roy C. Williams for Writ of Certiorari in companion Cause No. 75-209, Respondent submits that the judgment of the Court of Appeals is correct; further, that no meritorious arguments are made by Petitioner Williams in said companion cause; and,

furthermore, that no meritorious grounds for reversal are offered by Petitioner Brasea in this cause.

However, even if the Court of Appeals had affirmed Respondent's liability to the Plaintiff below, Roy C. Williams, on the theory of strict product liability, Respondent submits that Petitioner Brasea would, nevertheless, not be entitled to indemnity from Respondent. As this Court is very aware, neither *Ryan* nor *Italia Societa* hold that a ship owner is entitled to indemnity from a product manufacturer. Both cases involve the question of indemnity owing to a ship owner from a stevedoring company for damages to an injured employee of the stevedoring company. In both cases the injured party was a longshoreman, not a ship's master.

The relevant holding in *Ryan* was specifically limited by this Court to the question of the right of indemnity owing the ship owner from the stevedoring contractor. The right of indemnity was solely premised upon the stevedoring contractor's contractual obligation to the ship owner. *Ryan,* 350 U.S. at 132-134.

In *Ryan* the stevedore was found negligent. In *Italia Societa* this Court held that the *Ryan* doctrine would apply in the absence of negligence on the part of a stevedore, again premising indemnity upon the contractual relation between the ship owner and the stevedore.

Neither *Ryan* nor *Italia Societa* are authority for the broad sweep of indemnity urged by Petitioner. Petitioner has produced no case in which a manufacturer of a vessel's equipment has been made to indemnify the vessel owner for an injury to the vessel's master involving the manufacturer's product.

As stated by the Court of Appeals, if on remand the District Court finds Seaman Edward Terry, and thus Brasea (*respondeat superior*) negligent in re-engaging the power to the winch, then the sole source of Brasea's liability will be that negligence and not any conduct of either Construction Machinery Company or Bender, 497 F.2d at 75 (Appendix, Petition for Writ, p. 49).

II

DETERMINATION OF THE QUESTION OF INCORPORATION OF STRICT PRODUCT LIABILITY INTO FEDERAL MARITIME LAW WAS UNECESSARY, AND THE COURT OF APPEALS' DEFERRAL OF DETERMINATION OF THE QUESTION PRESENTS NO CONFLICT WITH ANY OTHER COURT OF APPEALS.

Just as Williams argues in his Petition for Writ in companion Cause No. 75-209, Brasea argues here that the opinion of the Court of Appeals is in direct conflict with prior decisions of this Court and other federal appellate courts because of its refusal to decide the question of incorporation. Pet. for Writ, pp. 15-16. As Respondent points out in its Brief in Opposition to Williams' petition, determination of the question of incorporation would not have advanced William's cause. The answer lies in the Court of Appeals' opinion: "[*E*]*ven if* products liability law is to be incorporated into our general maritime law, there can be no liability under the facts of this case." 497 F.2d at 78 (App., Pet. for Writ, p. 54).

Respondent agrees that the appearance of the tort theory of strict product liability is of recent vintage in maritime law. Only the Eighth Circuit in *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972), has specifically incorporated into federal maritime law the theory of strict product liability. Neither the Sixth Circuit in *Schaeffer v. Michigan-Ohio Navigation Company*, 416 F.2d 217 (6th Cir. 1969) [a negligence case], nor the Seventh Circuit in *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965) squarely faced and affirmatively decided the issue of incorporation.

Be that as it may, this question of incorporation is academic here. The determinative issues are whether the theory of strict product liability applied by both the Court of Appeals and the District Court below is a correct one, even assuming the appropriateness of incorporation, and whether the Court of Appeals' application of the theory is correct.

It is submitted that there is no maritime law of strict product liability other than that stated in the *Restatement (Second) of Torts*, Sec. 402A (1965). The only Circuit Court, the Eighth, which has specifically incorporated into federal martime law the theory of strict product liability, *Lindsay v. McDonnell Douglas Aircraft Corp., supra*, specifically applied Section 402A of the *Restatement:*

> "We hold that the correct law to be applied to this case is expressed in Restatement (Second) of Torts §402-A (1965), as it is the best expression of the doctrine as it is generally applied, and for the additional reason that several federal courts have previously used that section in maritime cases [cases cited]. *Lindsay*, 460 F.2d at 636.

When the Seventh Circuit discussed the theory of strict product liability in a case within its admiralty jurisdiction, *McKee v. Brunswick Corp., supra,* it appears to have referred to Illinois law. By that time Illinois had adopted the theory of strict product liability and had followed the position taken in Section 402A of the *Restatement. McKee,* 354 F.2d at 583.

How does Petitioner Brasea counter the foregoing? Petitioner makes no counter. No showing is made by Petitioner of any different application of that theory of liability by any other circuit court, or federal district court, on the liability issues actually presented in this case. For that matter, Petitioner does not even cite any authoritative state court case utilizing an interpretation of that theory of liability which would suggest a different result.

III

THE COURT OF APPEALS DID NOT APPLY ANY IMPROPER STANDARD OF REVIEW IN REVERSING THE DISTRICT COURT'S FINDINGS ON LIABILITY AND CAUSATION AS TO CONSTRUCTION MACHINERY COMPANY.

With respect to the reversal by the Court of Appeals of the District Court's holding this Respondent liable under the theory of strict product liability, it is submitted that Petitioner raises nothing more than its dispute of the Court of Appeals' interpretation of the evidence.

On the one hand, Petitioner Brasea claims that the Court of Appeals "departed" from the "clearly erroneous" standard of review (Rule 52a, Fed. R. Civ. P.); on the other hand, Petitioner acknowledges the Court of Appeals' awareness of the "clearly erroneous" standard (Pet.

Writ, p. 9). Overlooked by Petitioner is the nature of the relevant holdings of the Court of Appeals.

The Court of Appeals reversed as to Construction Machinery Company as a matter of law. The Court of Appeals held as a matter of law that this Respondent's winch was neither "defective" nor "unreasonably dangerous", nor was it the legal cause of Williams' injuries. The Court of Appeals did not substitute its view of the proper weight of any conflicting facts for the determination made by the District Court. The facts upon which the Court of Appeals reversed the holding of strict product liability are uncontroverted.

Because Petitioner Brasea satisfied itself with a blanket condemnation of the Court of Appeals' reversal of the District Court, without bothering to justify its argument with authority or reasoning, this Respondent will not lengthen this brief with argument and authorities supporting the Court of Appeals' reversal as to Construction Machinery Company. Instead, Respondent would refer this Court to that portion of its Argument in its Brief in Opposition to Williams' Petition for Writ in companion Cause No. 75-209, to-wit, Sections III, IV, and V.

To summarize Respondent's argument in those sections, the Court of Appeals correctly held Respondent not liable because the record simply contains no support for any requirement that Respondent provide a braking mechanism for its winch cathead. As amply demonstrated in the Court of Appeals' discussion of the relevant uncontroverted facts and law, Respondent's winch was neither "defective" nor "unreasonably dangerous". There was no showing of any strict product liability for the absence of such a brake. Further, the legal cause of Williams' injuries were either

his giving of an order to Terry to power the winch, when his hands were on the whipline and in close proximity to the cathead, or Seaman Terry's powering the winch without such an order. In any event, under the record, Terry intentionally and deliberately re-engaged power to the winch when Williams' hands were on the whipline and in close proximity to the winch.

CONCLUSION

None of the challenges raised by Petitioner Brasea justify the exercise of this Court's writ jurisdiction. Several of the questions raised are really academic. The material issues in the case do not involve ". . . principles the settlement of which is of importance to the public as distinguished from that of the parties . . ."; nor does Petitioner show any ". . . real and embarassing conflict of opinion and authority between the circuit courts of appeal . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). See also, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

As to Petitioner's argument claiming a right to indemnity from this Respondent, first of all, it is specifically conditioned upon the possibility that this Court might reverse the Court of Appeals' holding of no primary liability against this Respondent. Secondly, Petitioner fails to produce any authority for any such right to indemnity. And no conflict of authorities is demonstrated.

The issue about incorporation of strict product liability into maritime law is not only irrelevant to a decision of the case, but, moreover, untimely, given the scarcity of consideration of the issue among the circuit courts.

Finally, in complaining of the Court of Appeals' exoneration of this Respondent from any liability under the theory of strict product liability, Petitioner offers absolutely no reasoning nor legal authority requiring any contrary result.

For the reason stated, Respondent, Construction Machinery Company, respectfully submits that the opinion of the Court of Appeals is in all respects correct, and that the Petition of Brasea, Inc., for Writ of Certiorari should be refused.

Respectully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto (in the case of Cleveland & Shaaber, air mail postage prepaid), certified mail, return receipt requested, addressed to each of the following counsel: Mr. Charles D. Kennedy, Suite 3710, One Shell Plaza, Houston, Texas 77002 and Mr. Jack G. Carinhas, Jr., P. O. Box 71, Brownsville, Texas 78520 attorneys for Petitioner Brasea, Inc.; Mr. J. Robert McKissick, Law Offices of William R. Edwards, P. O. Drawer 480, Corpus Christi, Texas 78403, and Cleveland & Shaaber, Barnett First National Bank Building, Jacksonville, Florida 32202, Attorneys for Roy C. Williams; Mr. A. J. Watkins, Watkins & Marshall, 750 The Main Building, Houston, Texas 77002, attorney for Bender Welding & Machine Company, Inc., on this _____ day of September, 1975.

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